STATE OF MICHIGAN

COURT OF APPEALS

SUSAN GROSSMAN,

Plaintiff-Appellant,

v

LISS & ASSOCIATES, P.C., and ARTHUR LISS, ESQ.,

Defendants-Appellees,

and

ARNETHA P. WELLS, MARY WALKER, AMERICAN INSURANCE COMPANY, MITCHELL GROSSMAN, AERO INN, INC., and AERO INN I, INC.,

Defendants,

and

FIRST UNION NATIONAL BANK,

Intervening Plaintiff.

UNPUBLISHED
February 11, 2003

No. 234322
Oakland Circuit Court
LC No. 1999-016225-NI

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment granting summary disposition in favor of defendants Liss & Associates, P.C., and Arthur Liss, Esq., pursuant to MCR 2.116(C)(8) and (10).[1] This case arises out of the alleged negligence of a notary public employed by defendant

[1] The other defendants are no longer involved in the action and appeal. A two-million dollar default judgment was entered against defendant Mitchell Grossman. The remaining defendants settled and/or were voluntarily dismissed. Intervening plaintiff First Union National Bank has not filed a claim of appeal. For purposes of this opinion, reference to "defendants" concerns Liss and the law firm only unless otherwise stated.

law firm that occurred on July 25, 1997. The appeal involves only plaintiff's claims premised on respondeat superior and negligent supervision. We reverse the dismissal of the respondeat superior claim with regard to defendant law firm only, and affirm the dismissal of the negligent supervision claim as to both defendants.

I. ALLEGATIONS CONTAINED IN PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff alleged as follows in her first amended complaint. Plaintiff was married to defendant Mitchell Grossman until their divorce was granted in 1999 by a circuit court in Florida. The Grossmans were friends and acquaintances of defendant Liss up to and including July 25, 1997. In 1993, Mitchell Grossman was convicted of bank bribery, and Liss was aware of the conviction. During the summer of 1997, Liss provided the use of his law office and staff members to Grossman,[2] and Grossman was allowed to conduct his business affairs from Liss' office.

On July 25, 1997, defendant Wells was employed by defendant law firm as a legal secretary, in which position she would at times notarize documents. Plaintiff alleged that on occasion, Wells would notarize documents without ascertaining whether the signature she was certifying was genuine.

Grossman was the sole shareholder in defendant Aero Inn, Inc., and the corporation was the owner of commercial property located in Ohio that had a value in excess of $2,000,000 as of July 1997. Plaintiff held a mortgage on the property in the amount of $1,230,000, which was security for a loan that she had made to the corporation. Grossman prepared a fictitious document entitled "Assignment of Mortgage" [assignment] that purportedly assigned plaintiff's mortgage in the Ohio property to Grossman. The document bore the forged signature of plaintiff as assignor. The assignment was purportedly witnessed by defendant Walker. On July 25, 1997, Grossman, while on the premises of defendant law firm, presented the assignment to Wells in order to obtain a notary certification. Wells notarized the assignment and certified that plaintiff had personally appeared before her and acknowledged freely signing the assignment.

Allegedly, plaintiff never appeared before Wells, never acknowledged executing the assignment, and never signed the assignment; the assignment was a forgery. Grossman recorded the assignment in Ohio, and he subsequently transferred the commercial property to a new entity, defendant Aero Inn I, Inc.[3] Grossman utilized the situation to borrow $1,347,356 from intervening plaintiff First Union Bank of Ohio, who then recorded its mortgage as the apparent first lien holder. Grossman then absconded out of the country with the money, along with other assets belonging to plaintiff.

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[2] We shall reference Mitchell Grossman as simply "Grossman" for the remainder of this opinion.

[3] Documentary evidence presented to the trial court indicated that once Grossman recorded the assignment, he executed a satisfaction of the assignment, thereby removing any encumbrance on the property. The property was then transferred by Grossman to defendant Aero Inn I, Inc., a corporation owned by Grossman, and with the property unencumbered, the new corporation, i.e., Grossman, was in a position to borrow money with the property serving as collateral, which is exactly what occurred.

Plaintiff's complaint alleged a claim of negligence against Wells, along with claims against defendants Liss and the law firm predicated on respondeat superior, negligent supervision, and negligence – anti social propensities. As noted above, the only claims subject to this appeal are those alleging liability on the basis of respondeat superior and negligent supervision.[4] Intervening plaintiff bank filed claims of fraud and negligence against Wells, and claims based on respondeat superior, negligent supervision, and reckless conduct against defendants law firm and Liss.[5]

II. SUMMARY DISPOSITION

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing, in relevant part, that no duty was owed to plaintiff, and that defendants could not be held responsible for the act of the notary public/secretary, Wells, based on respondeat superior because she was not acting within the scope of her employment when she notarized the assignment.

The trial court, ruling from the bench, stated in pertinent part:

> As for the respondeat superior liability claim with regard to the corporate defendant, the defendants argue that Ms. Wells' acts were not within the scope of her employment because the document at issue was not notarized for a client at Mr. Liss' or another employee's request. This court agrees. There is no dispute that Mr. Liss permitted Mr. Grossman to use the firm's office and phone. There is no evidence that Ms. Wells was instructed to do any work for him nor advised that he was in any way a member of the firm.
>
> Additionally, there is no evidence that the firm had any control over the Ohio loan. The duties of a notary are statutorily enumerated and there is no independent [sic] on the part of the law firm to provide additional training on how a notary is to exercise those duties. The motion is granted with regard to that liability claim against the corporate defendant. . . .
>
> With regard to the respondeat superior liability claim against Mr. Liss personally, the evidence regarding his relationship with Mr. Grossman is irrelevant to this count. There is no dispute that Ms. Wells was an employee of

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[4] The claim alleging negligence because of defendant Liss' disregard for Grossman's anti social propensities was dismissed for lack of supporting authority. The remaining claims in plaintiff's complaint included an action on Wells' surety bond against defendant American Insurance Company, a negligence claim against defendant Walker, and a claim against defendants Grossman, Aero Inn, Inc., and Aero Inn I, Inc., for a fraudulent conveyance, MCL 566.101 *et seq.*

[5] In Ohio, plaintiff and First Union litigated a dispute regarding the mortgage and mortgage priority on the commercial property, and an Ohio court found in plaintiff's favor, ruling that the assignment of mortgage was forged and thus void; therefore, plaintiff was restored a first-priority lien on the property. Plaintiff, however, still claims financial losses arising from the situation, including, presumably, the costs associated with the Ohio litigation.

> the firm and not of Mr. Liss personally. The motion is granted with regard to Mr. Liss personally . . . .
>
> With respect to the negligent and reckless supervision complaint[,] plaintiff suggests that the evidence regarding Mr. Liss' failure to give specific instructions to Ms. Wells regarding how to notarize documents and allowing Mr. Grossman's use of his office supports the imposition of a duty under MRPC [Michigan Rules of Professional Conduct]. However, [plaintiff fails] to present any authority that such conduct gives rise to a civil action against the partner individually or against the firm.
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> With regard to the [negligent] supervision and reckless conduct claims[,] the motion is granted under C-8 . . . .

We find it abundantly clear, although not specifically expressed, that the trial court's dismissal of the respondeat superior claim was premised on a lack of a genuine issue of material fact pursuant to MCR 2.116(C)(10).

III. ANALYSIS

A. Standard of Review and Tests for Summary Disposition

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). Issues of law are also reviewed de novo. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997).

MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Our Supreme Court has ruled that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id*. Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363.

B. Notary Public – Scope of Employment

Plaintiff first argues that there was a genuine issue of fact regarding whether Wells was acting within the scope of her employment when she notarized the assignment.[6] We agree.

Under the doctrine of respondeat superior, an employer may be vicariously liable for an employee's action that is committed within the scope of his or her employment. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). The employer cannot be held liable for an act committed by the employee, where the act is beyond the scope of their employment. *Borsuk v Wheeler*, 133 Mich App 403, 410; 349 NW2d 522 (1984). An employer is not liable if the employee's tortious act is committed while the employee is working for the employer but the act is outside her authority. *Green v Shell Oil Co*, 181 Mich App 439, 446; 450 NW2d 50 (1989). There is no vicarious liability if the employee steps aside from her employment to gratify some personal animosity or to accomplish some purpose of her own. *Id.* at 446-447. An employer can be held liable under the doctrine of respondeat superior, where the employee could in some way have been promoting or furthering the employer's business. *Bryant v Brannen*, 180 Mich App 87, 98-99; 446 NW2d 847 (1989). An employer may be liable if the employee commits a tort while involved in a service of benefit to the employer. See *Kester v Mattis, Inc*, 44 Mich App 22, 24; 204 NW2d 741 (1972). Vicarious liability may arise even where the employee's action was not specifically authorized if the act is nevertheless so similar to or incidental to the conduct that is authorized, taking into consideration such matters as whether the act is commonly done by the employee. *Bryant, supra* at 99-100, quoting 1 Restatement Agency, 2d, § 229, p 506. The determination whether an employee is acting within the scope of his or her authority is generally a question of fact for the jury. *Green, supra* at 447; *Rowe v Colwell*, 67 Mich App 543, 549-550; 241 NW2d 284 (1976).

Plaintiff submitted to the trial court documentary evidence, including the deposition testimony of plaintiff, Liss, Wells, and others. This evidence indicated that Liss had known Grossman socially for over thirty years. Moreover, Liss had served as counsel for Grossman in at least four matters, and he had conferred with Grossman regarding Grossman's 1993 guilty plea for felony bank bribery. Liss acknowledged that Grossman had been in Liss' office on an occasion or two. Liss described his role in defendant law firm as president, lawyer, senior, chief cook and bottle washer; he was "in charge of everything," and there were no other shareholders.

There was deposition testimony that Grossman, around the time of the notarization, told others he could be reached at Liss' law office, and testimony that Grossman was using a desk and a telephone in the law office. Plaintiff testified that, while married to her ex-husband, her family and Liss' family socialized together. She also testified that her ex-husband had several conversations with Liss concerning the bank bribery case.

Wells testified that she was employed by defendant law firm as a legal secretary who worked specifically with Liss, and she had been a notary public for as long as she was a legal secretary, which was approximately fifteen years. Wells acknowledged that she had at times

[6] Plaintiff does not challenge the trial court's ruling that defendant Liss was not subject to liability under the doctrine of repondeat superior because the law firm, not Liss, was plaintiff's employer. Therefore, the dismissal of the claim as to Liss stands.

notarized documents for persons who were not members of the law firm, that she notarized documents regularly, that she had seen Grossman on at least two occasions at the office, including once when he was using the office printer, and that she knew that Grossman was a friend and client of Liss. Wells, although not specifically recalling her notarization of the assignment, testified that to best of her knowledge, she had never met plaintiff and that sometimes she notarized signatures for people who were not present. Wells stated that the only way she became familiar with Grossman's name was through her work at defendant law office. She also testified that she thought that Grossman might be a current client of the firm at the time of the notarization.

The trial court concluded that Wells was not acting within the scope of her employment because Grossman was not a client of the law firm nor did Wells notarize the assignment at the direction or request of Liss or any other employee of the law firm. We fail to see how these factors conclusively result in the determination that Wells was not acting within the scope of her employment. Simply because Grossman was not a present client of the firm and Wells was not directed to act as a notary in this specific instance, it does not necessarily follow that Wells' was not acting within the scope of her employment. It is not disputed that Wells had general authority to notarize documents as a legal secretary for the law firm. Additionally, there is no evidence that Wells notarized the assignment to gratify some personal animosity or to accomplish some purpose of her own. Further, there is no evidence that Wells notarized the assignment in the face of instructions to the contrary. Based on the fact that Grossman had been a prior client, and thus a potential future client,[7] was a personal friend of the boss, and had use of the law office, there is a genuine issue of fact regarding whether Wells' action was promoting or furthering the business of the law office; therefore, there exists a factual issue whether she was acting within the scope of her employment. It is not unreasonable to believe that Wells felt obligated, as part of her job and of service to the law firm, to act as a notary for Grossman. Moreover, it is illogical to conclude that an employee must receive specific instructions from an employer to undertake a particular act in order for the act to be within the employee's scope of employment or authority. See *Bryant, supra* at 99-100.

Defendant law firm argues that Wells' act constituted an intentional tort that, as a matter of law, could not be construed as having been done in furtherance of the firm's business. We disagree.

"An employer is liable for the intentional tort of his employee if the tort is committed in the course and within the scope of the employee's employment." *Bryant, supra* at 98, citing *Burch v A & G Associates, Inc*, 122 Mich App 798, 804; 333 NW2d 140 (1983); *Green, supra* at 446. The *Bryant* panel stated that "when an employee commits a minor crime, a jury question arises as to whether that employee was acting within the scope of his employment." *Bryant, supra* at 102-103. Here, Wells, in general, had authority to notarize documents while employed with defendant law firm. A question of fact remains whether she was acting within the scope of

[7] We note that there was some evidence presented that may have indicated that Liss and Grossman had an ongoing attorney-client relationship at the time of notarization. A law firm in Ohio sent a letter to Liss asking him for an opinion letter in regards to the loan from First Union to Grossman's corporation. Liss could not prepare the letter because he was in trial.

her authority, let alone whether her act constituted an intentional tort. Additionally, there is a question of fact whether Wells was acting in an attempt to further the law firm's business. We question the nature of any benefit received by Wells in notarizing the assignment.

Defendant law firm also argues that it cannot be held vicariously liable because when a notary public performs an act, she is acting solely in the furtherance of her public office and is subject to Michigan statutory law and the Secretary of State, not the private employer. Therefore, according to defendant law firm, she was not acting within the scope of her employment. We disagree.

Initially, we note that defendant fails to cite any authority in support of its position. Regardless, the argument lacks merit. Simply because a notary public is considered a public officer, or as holding public office, MCL 55.107 *et seq.*, is does not mean that when a notary exercises his or her authority in the context of an employment situation that they are not acting within the scope of their employment or furthering the interests of their employer. It is beyond dispute that legal secretaries often become notaries as a necessity of employment in order to further a law firm's ability to carry out its practice of law through the execution of various legal documents. Moreover, the fact that a notary public is subject to discipline by the state, MCL 55.107(4), is irrelevant. Under defendant law firm's argument, any person engaged in an act which requires state licensure or certification, and who is therefore subject to state discipline for improper acts, would not be acting within the scope of their employment, where they utilize the license as an employee in furthering the business of an employer. This argument does not withstand scrutiny and would improperly defeat suits against employers of, among others, doctors, nurses, and lawyers.

We reverse the dismissal of the respondeat superior claim with regard to defendant law firm.

C. Notary Public – Negligent Supervision

Plaintiff next argues that the trial court erred in dismissing the negligent supervision claim against defendants. Plaintiff asserts that the failure to supervise and instruct Wells regarding the proper manner to notarize documents is a violation of the Michigan Rules of Professional Conduct (MRPC), thereby giving rise to a civil cause of action.[8] We note that plaintiff did not cite the MRPC with regard to the allegations in the negligent supervision count of the complaint. Plaintiff frames her appellate arguments, however, solely in the context of the MRPC giving rise to a cause of action without reference to other authority or argument supporting a negligent supervision claim.

It is clear that a violation of the MRPC, in and of itself, does not give rise to a cause of action. MRPC 1.0(b) provides, in pertinent part, that "[t]he rules do not, however, give rise to a cause of action for . . . damages caused by failure to comply with an obligation or prohibition imposed by a rule." Therefore, plaintiff's argument fails.

[8] Plaintiff relies on MRPC 5.3, which requires law firm partners and supervisory attorneys to make reasonable efforts to ensure that the conduct of nonlawyer assistants is compatible with the professional obligations of the lawyer.

Even without reference to the MRPC, plaintiff fails to state a cause of action for negligent supervision. We cannot conclude that an attorney-employer has a legal duty to train or instruct a notary-employee that a person, whose execution of a document is being notarized, must personally appear before the notary-employee prior to the document being notarized. An employer does not train an employee to become a notary public; rather, the employee becomes a notary following application and certification through the state. MCL 55.107 *et seq.* Moreover, a notary public specifically attests that a particular individual personally appeared before them and signed a document or acknowledged a signature on a document. It would be nonsensical to require a law firm or any other employer to reiterate the obvious, and that which is specifically attested to, that an individual must personally appear before the notary. We are not ruling that an employer is not liable for negligent supervision, where the employer knows that the notary-employee notarizes documents in an improper manner and the employer fails to act accordingly, or where the employer knows that the notary-employee is going to improperly notarize a particular document. However, plaintiff has failed to present documentary evidence in this regard.[9]

IV. CONCLUSION

We reverse the dismissal of the respondeat superior claim against defendant law firm; however, regarding defendant Liss, the dismissal will not be disturbed because it was not challenged by plaintiff. We affirm, with regard to both defendants, the dismissal of the negligent supervision claim.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

[9] Although Wells as much as admitted that she had improperly notarized documents in the past, there was no evidence that defendants were aware of her practice or directed her to so act. Additionally, there is no evidence that defendants knew that Wells improperly notarized the assignment or directed her to do so.